NO. 82-278

Office - Supreme Court, U.S.
FILED
OCT 6 1982
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LESTER JACKSON,

Petitioner,

v.

WASHINGTON MONTHLY COMPANY, CHARLES PETERS and JOHN ROTHCHILD,

Respondents,

-and-

LESTER JACKSON,

Petitioner,

v.

WASHINGTON MONTHLY COMPANY, ET AL.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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The printing errors in the Petition are deeply regretted. Please see *infra* 1a for corrections.

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REPLY BRIEF FOR PETITIONER

The main difference between the Petition ("Pet") and Brief in Opposition ("Op")* is that the former is extensively documented. Defendants heavily use adjectives to mischaracterize the record; but Jackson's fully documented account of what actually happened below—however labeled—is uncontested by any defense reference to the record. Even so, responsible advocacy demands reply to distortions and misstatements obscuring the critical facts and issues.

The *central fact* is that the claim of judicial bias is exceptionally well-documented (Pet 1-2, 10); it is thus an excellent vehicle for review of multi-circuit failure to apply the recusal statute to federal trial judges. By contrast, defendants rest solely on conclusory assertion; apart from incomplete** reliance on the very orders and judgments *** sought to be reviewed, and one oral argument quote that Jackson already quoted (Op 6; Pet 8), their brief has *not one* citation to the record. That is understandable, for there is "no semblance of evidence . . . whatever in the record to support" the results below. *Thompson v. Louisville*, 362 U.S. 199, 205-206 (1960).

This case is also an excellent vehicle for review because the affirmances below were based squarely on recusal aversion (Pet 6-8). Accordingly, the *central issue* is whether, on a record of clear federal-trial-judge partiality, 28 U.S.C. §455 (1974) can ever be an effective remedy or will remain useless; and whether this Court is going to do anything about lower Court emasculation of §455, or prefers that all hopes for corrective action rest on Congressional interference with federal court procedures (Pet 12,19-20).

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* All other abbreviations are listed in Pet, at v.

** In Case 1, the Opposition appendix contains only the "final" Sept. 24, 1979 summary judgment order but omits the Oct. 2, 1979 order denying complaint amendment (Pet 35a). In Case 2, it omits the orders underlying the dismissal (cf. Pet 22a-26a). On the significance of the omitted material, see Pet 1n, 32, 7, 30; *infra* 9, 10.

*** The judgments are mislabeled "opinions" (Op 3), perhaps in the hope of creating an illusion of full consideration.

I. CERTIORARI HERE IS VITALLY IMPORTANT

Contra the claim that the Petition does not show importance (Op 5,10), this Court has stressed many times the imperative of impartial adjudication (Pet 13-14). Only 2 years ago, Justice MARSHALL noted adjudicative neutrality is a requirement "jealously guarded by this Court," for it is "important to popular government" and due process, by helping "guarantee that life, liberty, or property will not be taken" erroneously. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (unanimous).

If anything, the importance of federal-trial-judge impartiality is increasing sharply. In August-Sept. 1982 five Justices addressed the problem of heavier workloads.* As noted by Justice STEVENS, in "courts throughout the country, the heavy flow of litigation is having a more serious impact on the administration of justice than is generally recognized." Speech August 6, 1982, at 3.

As increasing caseloads make meaningful and complete appellate review harder for large numbers of litigants to obain, the wide and powerful discretion of federal trial judges becomes increasingly final, with little realistic chance to remedy its abuse. Accordingly, more than ever, it is critical to assure confidence in the impartiality of discretion.

Respondents' *Rice v. Sioux City Cemetary*, 349 U.S. 70 (1954) is wholly distinct; a new law was enacted, making the case applicable to Rice only. The analogous situation would apply here if Congress were to remedy the defects that have resulted in wholesale disregard of §455 (Pet 11-12,17-22). Peremptory challenge legislation is indeed pending (H.R.1649), but it has yet to pass.

Hence, instead of a new law making the petition "academic" as in *Rice* (Op 5), here this Court should grant certiorari to make the need for new legislation "academic" (Pet 12,n.14;20).

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* See "Justices Complain About Workload," 40 *Cong. Quarterly Weekly Report*, 2314-15 (Sept. 18, 1982).

II. STRIPPED OF SOPHISTRY AND ARBITRARY MISAPPLIED CONCLUSORY ADJECTIVES, DEFENDANTS' ATTEMPT TO DENT THE RECORD'S WELL-DOCUMENTED JUDICIAL BIAS IS MERELY A PLEA THAT THIS COURT SHOULD *NEVER* REVIEW THE GRAVE ISSUE OF WIDESPREAD NON-ENFORCEMENT OF FEDERAL-TRIAL-JUDGE IMPARTIALITY.

Repeated use of conclusory and pejorative adjectives does not, without more, establish their validity (cf. Case 1 Ct.Ap.Rep.Br. at 2-3). Wholly lacking any evidentiary support, defendants' exercise in name-calling furnishes an ironic and graphic illustration of (a) the very vices of which they accuse Jackson and (b) the very deceptive traits that caused this litigation in the first place.

For example, they personally attack Jackson for making "personal attacks" as an "obsessed litigant" (Op 3-4). Translated, this means *no* plaintiff's claim of due process violations should be reviewed, for any such plaintiff is *per se* an "obsessed" "attacker" who "characteristically" avoids the merits (Op 4).

It is perfectly plain, however, that *every* plaintiff who comes here seeking due process review is subject to such a charge. To get here, he had to (a) file a complaint against defendants for doing something wrong,* (b) assert the trial judge violated due process in some fashion, and (c) petition this Court to review Circuit disregard of the claimed violation(s). He is understandably entitled to believe he has been denied due process, *a fortiori* if no court has *ever* said one word to explain why he should believe otherwise. Cf.Pet 25-6.

Finally, the essence of any claimed due process violation is that the merits were not fairly adjudicated. So "it is characteristic" of *every* petition for review of such violation that it "seeks certiorari . . . not on [the] merits" (Op 4). It is utterly pointless to seek review of the merits when they were never

* "When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common." *Ammerman v. Newman*, 384 A.2d 637, 641 (D.C. App. 1978).

considered in the first place. The narrowly limited purpose here is simply to correct procedural abuses and remand for merits consideration *ab initio.*

A. *Misleading and False Statements About "Attacks."* Defendants try to reinforce their own unsupported *ad hominem* attack with distortion and fabrication. Thus, nowhere in the record does Jackson make "an attack on the integrity" of the district judge* (Op 4). Jackson questioned the judge's impartiality, not his integrity. Jackson concedes that some of the most biased individuals sincerely and in good faith believe they are not biased at all. That is precisely the basis of a common criticism of §455: that judges must decide their own cases (Pet 11-12,27).

As to alleged "attack" on "integrity of the court of appeals" (Op 4), there was no such attack. Defendants distort a section spelling out plausible *appearances* in this case, pursuant to an unexceptionable basic tenet: impartiality and due process must occur not only in fact but appearance (Pet 23-4). Jackson explicitly denied claiming what appeared true was actually true; rather, he said, given the critical import of what is *believed,* the Court should consider what is "plausibly as well as really true" (Pet 24).

And something surely does *appear* very wrong and improper when, without stated reason, a court of appeals (a) affirms discovery it orally condemned in the strongest terms and (b) refuses to discuss charges that judges and defendants themselves call "serious" (Pet 26).

Defendants not only distort Jackson's statements of appearances to be statements of fact, it is FLATLY FALSE that he stated, even as appearance, that court of appeals members were "improperly fraternizing with district judges" (Op4). He said the case at bar supports this Court's own 1921 holding that

* It is singularly brazen for these particular defendants, who have done their best to show and create disrespect for the courts, to attack Jackson for "attacking" judges. E.g., defendant Peters has stated: "I don't agree . . . the system is neutral. The legal system has a strong bias in favor of the rich" (A694). Defendant *Washington Monthly,* edited by Peters, published a June 1980 article on "How to Bribe Judges . . . " (A872). It is Jackson who has shown his faith in the courts as an instrument of redress, by making a great investment in his litigation.

appeal is an inadequate remedy in recusal cases and creates the *appearance* "inimical to confidence . . . that it is not proper for appeals judges to pass upon the neutrality of colleagues they see daily" (Pet 26-7). But Jackson did not say there is anything wrong with judges seeing each other.*

B. *Misleading and False Statements About Recusal Claims.* Confronted by recusal facts established beyond doubt by official court records, defendants do not—because they can not—deny what the trial judge said and did. Instead, they misstate what occurred and refute what Jackson never said, with adjectives and no reference to the record.

Defendants say Jackson sought recusal in Case 2 "on the basis of" the April 12, 1978 hearing in Case 1 (Op.2-3; cf. Pet 2,8n). In fact, the hearing was one of *many* bases, not *the* basis. The Case 2 recusal motion expressly relied upon Case 1 recusal reasons (the hearing being only one) and *new developments* in Case 2 independently warranting recusal (A742,745; Pet 4-6 and citations thereat).

As to the hearing, defendants cite not one example of how Jackson "carried on" or acted "inappropriate[ly]," nor one "extraneous" item he tried to enter (Op 3n).** And to say the judge's remarks, from beginning to end of a 195-page transcript, were merely "several" and "passing" does not make it so. Jackson has summarized these remarks (Pet 2-4) and

* Defendants try to trivialize the "essence" of Jackson's Case 2 complaint as concealment of the view that "he was a poor writer" (Op 2). This Court can see for itself (A604-5) that the essence of the complaint really was that the defendants fraudulently purported to propose, enter and carry out a settlement of Case 1. Indeed, for a whole year after dismissal of Case 1, to avoid a timely restoral motion, they pretended to negotiate, hiding their position that the dismissal relieved them of all obligations.

Further trying to avoid consideration of the evidence by discrediting Jackson, defendants imply impropriety, if not insanity, in his alleging fraud by 8 attorneys "most of whom . . . never had anything to do with the case" (Op 2). But, generally and under District of Columbia law, all partners are jointly and severally liable for the wrongful acts of any partner. 68 C.J.S. Partnership §181; D.C. Code §§ 41-312, 41-314 (1973) at *infra* 2a. (Despite conspicuous references to "professional corporations" (Op 10, cover), there has never before been any reference to the partners as anything but partners.)

Space limits preclude discussion of what was "extraneous" vs. relevant. See Pet. 56a-58a; 47a; 52a; 54a, n.

presented them in detail (Pet 48a-58a); so this Court can see for itself how really extensive they were.

More important, prejudgment is prejudgment, and hostility is hostility—whether expressed frequently or allegedly in "passing." After all, how many times and in how many ways does one have to say "I hate you" before it becomes significant? While very far from the only probative remarks, when the judge said "there is nothing on God's earth worse than" a litigant such as Jackson, that *alone* established hostility (Pet 2; cf 53a-55a); and when, *before* seeing *any* evidence on the merits, the judge said the case should not have been brought and Jackson's lawyer was a "sucker" to bring it, that *alone* sufficed to demonstrate prejudgment (Pet 3; cf 49a-50a).

Finally, defendants refute straw men (Op 6-7, n.4). Jackson never advanced, as recusal bases, that the judge ruled against him, spoke harshly, and showed "insufficient deference to a litigant." *Inter alia*, the claims were that the judge's statements were overt expressions of hostility and prejudgment; and, when a judge uses intense time pressure against a lone litigant but gives a huge law firm all the time it wants, that is not "adverse ruling"—it is overt manifestation of partiality (cf. Pet 55a).

III. DEFENDANTS FAIL TO SHOW WHY THIS COURT SHOULD NOT ESTABLISH UNIFORM MANDATORY STANDARDS OF ENFORCEMENT OF §455, TO REMEDY MULTI-CIRCUIT CONFLICT, CONFUSION AND NON-ENFORCEMENT

Defendants allege "the statute is being enforced" as shown by Jackson's "pages of cases" (Op 6). Of course he said the statute was enforced—but only by 5 circuits, the others wholly disregarding or emasculating it, causing conflict and confusion (Pet 17). He provided one footnote, not "pages," to show the 5 circuits that enforced the statute (Pet 17n). (Even they have not done so with any frequency or regularity).

To suggest mixed metaphor as a basis for petition denial (Op 6) highlights the utter vacuity of defendants' brief.

However characterized, Jackson's basic point is clear: a growing tendency in some circuits to disregard and emasculate §455 even in the most egregious cases of partiality such as this one. Such circuits "have devised myriad means of imposing narrowness" (Pet 12, 18, 20).

As evidence of this clear trend, Jackson also cited growing complaints of non-enforcement (Pet 11-12, 17), and peremptory challenge legislation proposed and pending in Congress (H.R. 1649). Since filing his petition, Jackson has learned hearings on a re-introduced H.R. 1649 are likely in 1983. Also, he has been informed by the Washington Office of the American Bar Association that the following bar groups have endorsed peremptory challenges:

1. American Bar Association*
2. State Bars: California, New Mexico, Nevada, Alaska, South Dakota
3. County Bars: Los Angeles, Sacramento, Maricopa (Phoenix), Santa Clara
4. City Bars: New York, Chicago, Milwaukee, St. Louis
5. Trial Lawyers of: California, San Francisco, Los Angeles, Western States
6. Lawyers Club of San Francisco

These endorsements evidence the reality of non-enforcement of the recusal statute.

On specifics of enforcement conflict, defendants re-quote a colloquy quoted by Jackson, use different italics, and declare there is no conflict (Op 5-6; Pet 8, 20). But their italics only highlight the problem. For the appeals court expressly differentiated between the *average* person on the street and a *reasonable* position. To suggest the average person on the street is not reasonable and should not assess the facts alleged to warrant

* In August 1979 and February 1980, the A.B.A. adopted positions in support of peremptory challenge legislation. Since then the A.B.A. has actively pressed for enactment of such legislation. See, e.g., John J. Cleary, *Statement on Behalf of the American Bar Association Concerning Motion for Peremptory Challenge to a Federal Judge*, 4-5 in *Hearings*, Subcommittee on Criminal Justice, House Judiciary Committee, June 6, 1980, 35-36.

recusal, conflicts with the 5th, 8th, and 10th Circuits (Pet 20-21).

So to cite the "reasonable man" standard leaves a criticcal conflict question for this Court to resolve: *WHO* is the reasonable man?: the average lay person on the street, the litigant, or the judge (Pet 21)?

Finally, defendants use yet another adjective for more conflicts; e.g., calling "technical" the question if §455 has a timeliness requirement (Op 7), even after they again argue Jackson raised recusal too late (Op 3). Cf. Pet 9n, 21.

IV. DEFENDANTS MISSTATE THE ISSUES; AND NO FULL OR EVEN PARTIAL CONSIDERATION OF PLAINTIFF'S ISSUES WAS MANIFESTED BELOW

No common law questions are presented on this Petition. The issue is due process and other procedural violations, by a federal trial judge in a case properly before him, that precluded full and fair impartial adjudication of substantive merits. *Supra* 3-4. Defendants claim the contrary (Op i, 2-3, 9-10), relying on conclusory assertion and the very orders/judgments sought to be reviewed.

Hence, although they *assert* the trial judge "carefully reviewed" Case 1 (Op 2), he not only failed to address any of the legal arguments or 7 affidavits opposing summary judgment, his opinion reflected utter unfamiliarity with Jackson's papers. See Pet 30-32; and esp. Case 1 Ct. Ap. Br. 28-30. Indeed, so "carefully reviewed" were Jackson's papers, the judge forgot to rule on, or even refer to, the motion to amend the complaint pending when he ordered summary judgment (Pet 32, 1n, 35a).

Next, defendants cite Jackson's filing of various briefs and appendices (Op 7-8). However, there is a vast difference between allowing someone to file papers* and actually considering

* Indeed, plaintiff's motion to file his Case 2 reply brief, on which he expended great effort, was denied because it arrived in the court of appeals 3 days after it would have had it been timely mailed (Pet 30n). (Interestingly, the

them. There simply is no evidence anywhere that anything Jackson said was fully considered, or considered at all—except to the extent that the court of appeals *orally* agreed with his discovery protests and then affirmed that discovery anyway, without stated reason. *Supra* 4.

Stressing D.C. Circuit Local Rule 13(c) and the judgments, defendants say there is "nothing unusual or inappropriate" about opinionless "full consideration" (Op 3, 9-10). First, Jackson did not say there was anything inappropriate about this procedure *per se,* but that it was subject to abuse and was clearly inappropriate *in this case* (Pet 25-6; *supra* 4). Second, "usual" District of Columbia practice is to give reasons when non-recusal is really justifiable.* The issue only appears to "occasion no need" for an opinion (Op 10) when non-recusal cannot be justified. Third, numerous commentators have expressed the view that reasonless decisions are highly inappropriate (Pet 25). They have been called "one of the most destructive things." Krash, D.C. Circuit Judicial Conference, 89 F.R.D. 169, 222 (1980). Local Rule 13(c) has been singled out as "the most cryptic" of the no-reason rules (Pet 25n).

It is surely "cryptic" to refuse to discuss fully documented and "serious" recusal claims (Pet 8-9, 26), or to say how an appeals court can affirm discovery it strongly condemned. Defendants say this was justified by "Jackson's repeated and contemptuous disobedience of the court's [discovery] orders" (Op 8). But the first order was so egregious, even defendants disregarded it (Pet 4; Case 2 Ct. Ap. Br. 15). Also, Case 2 was dismissed for "refusal" to depose 2 weeks *after* the dismissal order, which wholly disregarded objections to the entire discovery package (Pet 1n, 29-30; cf. Pet 5n).

Petition was received by defendants on August 19, 1982; their Opposition was due Sept. 18 but not filed until Sept. 21, 3 days late).

Defendants make the FLATLY FALSE claim that below Jackson "fil[ed] numerous lengthy briefs, which frequently exceeded page limitations" (Op 7). They do not cite an example because he never exceeded the page limits provided by Local Rules 8(g) and 8(b), *infra* 2a.

* See, e.g., *Christiansen v. Nat. Sav. & Trust Co.*, 683 F.2d 520, 524-6 (D.C. Cir. 1982) (recusal raised *sua sponte* on appeal and rejected); *U.S. v. Heldt*, 668 F.2d 1238, 1270-1272 (D.C. Cir. 1981); *U.S. v. Fiat Motors*, 512 F. Supp. 247 (D.D.C. 1981).

A. *The Real Issue on Non-Compliance* is thus whether the orders underlying dismissal were valid (Pet 4-6). This Court, and the D.C. Circuit itself, has ruled no litigant can be validly penalized for non-compliance with invalid orders; and such non-compliance is not "contemptuous" but a legitimate option to protect rights against irreparable harm. *U.S. v. Ryan,* 402 U.S. 530, 532 (1971) ("compliance . . . not . . . only course"; "he may refuse to comply and litigate" questions on appeal); *Black Panther Party v. Smith,* 661 F.2d 1243, 1255, 1265-6, 1271, 1259n (D.C. Cir. 1971).

Jackson argued in good faith that the orders underlying dismissal were invalid because the discovery ordered was abusively improper (as the appeals court orally agreed), and the judge making them was recusable and not validly on the case. See Pet 7 and citations thereat.

Hence, defendants' cases supporting dismissal (Op 8n) are wholly irrelevant. Dismissals justified by utterly different facts do not warrant dismissal here.*

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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October 5, 1982

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* Defendants' cases, involving incompetent pro se litigants, are used to distort another issue here: whether pro se litigants who are competent have the self-representation right (Pet 27-28). In *Bonaventure v. Butler,* 593 F.2d 625, 626 (5th Cir. 1979), *inter alia,* the complaint was "incomprehensible," there was no good faith effort to resolve any vital preliminary issue (here recusal), and there was no context of wholesale flagrantly abusive discovery. In *Hepperle v. Johnston,* 544 F.2d 201, 202, 590 F.2d 609, 610n, 613 (5th Cir. 1976, 1979), the plaintiff, unlike Jackson, required "less stringent standards" to assess his pleadings, sought to recuse every appellate judge in sight, and did not claim wholesale discovery abuse.

CRITICAL ERRATA IN PETITION*

page ii, line 1: "disqualify"

pages ii-iii: please verify if not missing

page 3, line 3: "Cf. 50a-52a"
2nd new paragraph, add at end: "Cf. 49a-50a."
3rd new paragraph, add at end: "Cf. 54a-55a."

page 10, n: "Cf. *infra* 20n."

page 11, 3rd paragraph: "warranted"

page 15, 2nd new paragraph, line 5: "E.g., he can"

page 30n, line 6: "copies to Washington (20a; . . ."

page 19a, 4th line from bottom: "entered"

page 53a, last full line of text: ' . . . disciplined"**"

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*To avoid burdening the Court, errata having no effect on meaning or substance are omitted.

Rules, United States Court of Appeals for the District of Columbia Circuit

Rule 8.

* * *

(b) Contents of Brief. * * *

The summary of argument shall not be considered part of the brief for purposes of the page limitations * * *

(g) Length of Briefs. Except by permission of the Court, principal briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. And except by permission of the Court, reply briefs shall not exceed 25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying.

District of Columbia Code (1973)

§41-312. Partnership bound by partner's wrongful act.

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, notn being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act. (Sept. 27, 1962, 76 Stat. 633, Pub. L. 87-709, §13.)

* * *

§41-314. Nature of partner's liability.

All partners are liable—

(a) jointly and severally for everything chargeable to the partnership under sections 41-312 and 41-313 ***

(Sept. 27, 1962, 76 Stat. 639, Pub. L. 87-709, §15).